No. 87-437

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RICHARD PINKNEY, *et al.*,
Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,
Respondents.

In re "Agent Orange"
Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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List of Parties

A list of the parties to the proceeding below, pursuant to Rule 34.2, includes the members of the plaintiff class and The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Diamond Shamrock Chemicals Company, T H Agriculture & Nutrition Company, Inc., Thompson Chemicals Corporation, and Uniroyal Incorporated.

For the listing required by Rule 28.1 of all parent companies, subsidiaries, and affiliates of each of the corporations, the Court is respectfully referred to the List of Parties set forth in the Brief in Opposition filed by Respondents The Dow Chemical Company, *et al.*, in the related case of *Krupkin* v. *Dow Chemical Co.*, No. 87-620.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

The petition seeks review of the decision of the United States Court of Appeals for the Second Circuit, (App. 676a),[1] which affirmed the class-action settlement of the "Agent Orange" litigation.

After more than five years of pretrial preparation, on May 7, 1984 counsel for the representatives of the plaintiff class and counsel for the various defendants agreed to a stipulation of settlement. The stipulation required the defendants to pay $180,000,000.00, plus interest, in settlement of all class members' claims. During August 1984,

[1] Citations to "(App.)" are to the Single Appendix filed by the various petitioners in Nos. 87-436, 87-437, and 87-438.

the district court reviewed hundreds of letters from class members and listened to nearly 500 individual veterans and other class members who expressed their views during eleven days of fairness hearings in five cities across the country. (App. 135a). After considering all relevant facts and the applicable legal principles, the district court approved the settlement as fair, (App. 387a-390a), and the court of appeals affirmed, (App. 676a).

The genesis of the litigation dates to late 1978 and early 1979, when several Vietnam veterans filed complaints in federal court seeking relief on behalf of a class of veterans and their families for personal injuries allegedly caused by the veterans' exposure to Agent Orange or other herbicides that were used by the United States as defoliants in Vietnam.[2] On May 8, 1979, the Judicial Panel on Multidistrict Litigation established *In re "Agent Orange" Product Liability Litigation*, MDL No. 381, and ordered the actions transferred to the Eastern District of New York. (App. 689a). Other actions were later transferred, so that by the time of the class-action settlement, more than 500 separate actions brought by some 11,000 named plaintiffs had been transferred from approximately 60 district courts and consolidated in the multidistrict proceeding.

Initially, the class members were unsuccessful in attempting to base their claims on jurisdictional allegations of federal common law. (App. 641a). Thereafter, they asserted diversity of citizenship as the jurisdictional basis

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[2] Agent Orange was a 50:50 mixture of the n-butyl esters of 2,4-dicholorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid. The name Agent Orange derives from the orange band painted on the drums in which the herbicide was delivered to the government. Plaintiffs' claims focused on the allegedly harmful effects of minute quantities of 2,3,7,8-tetrachlorodibenzo-p-dioxin that may have been present in trace amounts in the herbicide.

for their claims. (App. 690a). As pleaded in the Seventh Amended Complaint, all named plaintiffs were citizens of states different from the states of incorporation and principal places of business of the defendants. (JA 3530, 3531-33).[3]

In December 1983, the district court certified two classes, one for all issues under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and one under Rule 23(b)(1)(B) for punitive damages.[4] (App. 456a). The district court ordered that notice to the class be accomplished through a two-phase process. In the first phase of the class notice plan, class counsel was directed to mail written notice to:

> (a) [A]ll persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention * * * [and to]
>
> (b) [A]ll persons who are currently listed on the United States Government's Veterans Administration "Agent Orange Registry."

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[3] Citations to "(JA)" are to the Joint Appendix filed by the parties in the court of appeals.

[4] In affirming the settlement, the court of appeals did not find it necessary to review the propriety of the district court's Rule 23(b)(1)(B) certification, (App. 723a), and petitioner does not challenge that ruling before this Court.

(App. 477a-478a). Written notice was sent to all 11,256 claimants described in subparagraph (a) of the class notice plan, including petitioner. Written notice was also mailed to the 933 counsel associated with the plaintiffs' management committee. That latter mailing included a memorandum from lead counsel for the class requesting all associated counsel to furnish the names and addresses of all class members known to them.

At the same time, pursuant to subparagraph (b) of the class notice plan, written notice was also mailed to all 92,275 persons on the "Agent Orange Registry." (App. 478a). The Agent Orange Registry was instituted in 1978 by the Veterans Administration (the "VA") specifically to identify all Vietnam veterans who were concerned about their possible exposure to Agent Orange. (JA 17180 ¶ 2, 5634). As described in VA circular 10-78-219, which established the framework for the Agent Orange Registry:

> Recent publicity in the news media about illness among persons who were exposed to herbicidal agents used in Southeast Asia, may result in veterans presenting themselves at VA health care facilities for evaluation.
>
> * * * *
>
> VA policy is to examine thoroughly all veterans who claim toxic effects from exposure to herbicides during the Vietnam War and to maintain appropriate records on them so that any late complications due to these agents can be determined and treated.
>
> All Vietnam Era veterans who currently are being treated in a VAHCF, and those who apply for such care will be asked to identify their previous military occupational code number, and asked whether they were exposed to herbicidal sprays or

> bulk chemicals during their periods of service in Vietnam. * * *
>
> If a veteran states that he/she was exposed to defoliant sprays or bulk chemicals, he/she will be asked the questions appearing on the INITIAL DATA BASE, POSSIBLE EXPOSURE TO TOXIC CHEMICALS, PART I, of the regular medical history for an examination * * *.

(JA 3679). Records for each person on the Agent Orange Registry consisted of a medical file with a computerized extract referred to as the "register" that included the veteran's name and address. (JA 3676, 17181). Only a few months before the district court issued its class certification order, the VA had completed an updating of the names and addresses on the Agent Orange Registry. (JA 5634, 17181). In the view of the United States government, the Agent Orange Registry was the VA's "most effective means of identifying concerned Vietnam veterans." (JA 3677).

The district court concluded, (App. 476a-478a), and the court of appeals affirmed, (App. 726a-727a), that the 98,905 putative class members to whom writen notice was sent pursuant to the first phase of the class notice plan were the total number of class members who could be identified through reasonable effort.[5]

In the second phase of its class notice plan, the district court required various forms of "substitute" notice. The court availed itself of the widespread attention the Agent Orange litigation had attracted from the media, state agencies, and private veterans' organizations by ordering

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[5] When written notice was mailed to the claimants and to the persons on the Agent Orange Registry, a comparison of the two lists revealed 4,626 names that were duplicative, so that a total of 98,905 persons are included in the two groups. (JA 17233).

that announcements appear in various servicepersons' national publications and on radio and television. (App. 724a, 727a). In addition, the district court directed that a letter be sent to every governor, requesting that notice of the class action be provided to all state agencies that may have lists of Vietnam veterans. (App. 724a).

No class member, not even petitioner, objected to the class certification order or to any of the notice provisions adopted by the district court, until after settlement of the litigation was concluded.

Reasons for Denying the Writ

The main thrust of the petition is an attempt to show that the court of appeals improperly created new law to adjudicate a unique dispute. (Pet. at 5). Rather than creating new law, however, the decision of the court of appeals adhered to well-settled principles and precedents of this Court and conflicted with no decision of any other federal court of appeals. Moreover, the uniqueness of the Agent Orange controversy severely limits any precedential value that review of the decision may engender, and thus counsels against the expenditure of this Court's resources merely to offer petitioner an additional hearing.[6]

No new law has been created in this case. The court of appeals correctly held that diversity jurisdiction over the subject matter existed because the citizenship of the named plaintiff class members was different from the citizenship of the defendants. Two decisions of this Court dictate that holding. *Snyder* v. *Harris,* 394 U.S. 332 (1969); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921). No judicial authority exists for petitioner's curious

[6] In addition to the petition's legal infirmities, its bold assertions of fact are unsupported by citation to the record.

proposition that diversity jurisdiction over class actions requires all unknown and unnamed class members to be citizens of states different from the citizenship of the opponents of the class. Nor can petitioner offer any federal decision that conflicts with the court of appeals' decision affirming the notice sent to class members under Fed. R. Civ. P. 23(c)(2). Two of this Court's decisions, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), established the guidelines to which the court of appeals carefully adhered in affirming the order on notice. The Writ should not be granted because there is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" created by the court of appeals' rulings on diversity jurisdiction and class notice. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Review is unwarranted also because the decision of the court of appeals is inextricably bound to the unique factual circumstances of the case. *Cf. Brown* v. *Southeastern Pennsylvania Transportation Authority*, Nos. 86-2229, 86-4037, 86-5886 (E.D. Pa. Apr. 8, 1987) (The Agent Orange litigation is predicated upon a "unique factual setting.") Even petitioner concedes that "[t]he instant case is of a magnitude and complexity unlike any other" and "in many respects *sui generis.*" (Pet. at 5). On this basis alone, the Writ should not be granted. *See Milliken* v. *Bradley*, 433 U.S. 267, 298 (1977) (Powell, J., concurring); *Carter* v. *Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 438-39 (1949) (Frankfurter, J., concurring).

The limited precedential value to be garnered from reviewing the court of appeals' decision is especially illustrated by petitioner's argument on class notice. It is

well-settled that notice to class members must be the "best notice practicable under the circumstances." *Eisen,* 417 U.S. at 173. Both the court of appeals and the district court carefully examined all the facts and concluded that the class notice plan, which was tailored to the unique circumstances of the case, was the best notice practicable. Two exhaustive reviews is enough. As this Court has noted, "jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923); *see Rudolph* v. *United States,* 370 U.S. 269, 270 (1962); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955). No additional review should be granted here.

Finally, Mr. Pinkney is peculiarly unsuited to attack the settlement order for including "non-diverse" class members, or to champion the rights of absent class members who Pinkney imagines did not receive notice. He is a citizen of a state different from those of the defendants, and he and his counsel were sent notice.[7]

The Writ should be denied.

I.

The Decision of the Court of Appeals Is Based on Well-Settled and Unanimously Endorsed Principles of Diversity Jurisdiction.

Two decisions of this Court directly refute the jurisdictional arguments advanced by petitioner. In *Snyder* v. *Harris,* 394 U.S. at 332, Justice Black writing for the

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[7] The petition's lack of merit is further exposed by its "conditional" status. It will be withdrawn if the Court denies the petition in *Lombardi* v. *Dow Chemical Company,* No. 87-436. (Pet. at 4-5).

majority confirmed the rule announced in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. at 356, that diversity of citizenship exists where the *named* class members are citizens of states different from the citizenship of their opponents.

In spite of *Snyder* and *Supreme Tribe,* petitioner asserts that the court of appeals erred in affirming the district court's exercise of diversity jurisdiction over the class because it is "manifest" that some *unnamed* members of the plaintiff class and some defendants *must be* citizens of the same state. (Pet. at 6 & n.2). Petitioner also contends that the court of appeals' affirmance was in error because some named plaintiffs and some defendants were citizens of the same states. (Pet. at 14-17). Neither of petitioner's jurisdictional arguments is worthy of review.

A. Diversity Jurisdiction in a Class Action Is Measured by the Citizenship of the Named Parties.

The issue raised by petitioner has long been settled. Diversity jurisdiction has always been determined by examining the citizenship of the named parties to the particular dispute. The fact that the dispute happens to be a class action has never changed that rule.

In *Supreme Tribe,* 255 U.S. at 356, the Court held that inclusion in a class action of unnamed persons whose citizenship is the same as that of the named defendant did not defeat diversity jurisdiction. In that case, members of an Indiana fraternal benefit association from states other than Indiana brought a class action against the association to enjoin its proposed reorganization. The action was brought pursuant to former Equity Rule 38, which states:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them

> all before the court, one or more may sue or defend for the whole.

226 U.S. 659 (1912). After a judgment upholding the reorganization was entered, actions against the association which raised the same issues were commenced in state court by Indiana citizens. Asserting that the class judgment bound all members of the association, including the Indiana citizens, the association sought relief in federal district court to restrain the state actions. However, the district court refused to enter an injunction. It reasoned that joinder of the Indiana citizens in the original class action would have precluded the diversity jurisdiction of the court, and therefore the original decree did not bind them.

This Court reversed. *Supreme Tribe,* 255 U.S. at 356. It expressly held that the Indiana citizens were members of the class, that their presence as members did not defeat diversity jurisdiction, and that they were bound by the original decree:

> Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. * * *
>
> If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction.

Id. at 366-67.

Snyder was a class action for money damages under Fed. R. Civ. P. 23(b)(3), the same provision of Rule 23 under which the present class was certified. Justice Black, confirming the Court's holding in *Supreme Tribe,* wrote for the majority as follows:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. *See Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921).

Id. at 340.

Petitioner attempts to dismiss *Snyder* as *obiter dictum.* (Pet. at 11-13). As for *Supreme Tribe,* he characterizes that case as a "true" class acton, under a tripartite scheme created in 1938 and abandoned by this Court in 1966. *Id.* at 12. Petitioner labels the present class-action settlement as "spurious" under the same tripartite scheme. He proceeds to argue that the doctrine of *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806), permits diversity jurisdiction to be determined only in "true" class actions by the citizenship of named parties. For "spurious" class actions, however, petitioner would read *Strawbridge* as commanding that *all* class members, whether named or unnamed, must be of citizenship diverse from the opponents of the class.

Petitioner's distinction is illogical. If *Strawbridge* allows "true" class actions, it also allows any class action in which the citizenship of all named plaintiffs is different from the citizenship of the named defendants. If the rule were as petitioner suggests, then no class action brought under diversity jurisdiction—whether "spurious" or "true" —could include class members who were citizens of the same state as their opponents. *Supreme Tribe* teaches otherwise.

The outdated class-action categories belabored by petitioner have no relevance to diversity jurisdiction. *Supreme Tribe* was decided 17 years before former Rule 23 defined class actions as "true," "hybrid," or "spurious."[8] This Court in *Supreme Tribe* interpreted the same diversity jurisdiction provision at issue in *Strawbridge*, and held that diversity jurisdiction is established when the named class members are citizens of states different from the citizenship of the class's opponents. The type of class action simply is not germane to a proper determination of diversity jurisdiction. The principle followed by *Supreme Tribe* applies to all class actions. *Snyder* and the innumerable federal decisions endorsing *Supreme Tribe* foreclose any other conclusion.[9]

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[8] Under former Rule 23(a)(1), a "true" class action was one brought to enforce a right which was "joint, or common or secondary." A "hybrid" class action under former Rule 23(a)(2) was one in which the rights to be enforced were "several" and the claim involved specific property. A "spurious" class action under former Rule 23(a)(3) was one to enforce "several" rights involving common questions of law and fact and common relief. *See* 2 J. Moore, *Federal Practice*, § 23.00 at 2219 (1938).

[9] *See, e.g., Kerney* v. *Fort Griffin Fandangle Association, Inc.*, 624 F.2d 717, 720 (5th Cir. 1980); *United States ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Friedman* v. *Meyers*, 482 F.2d 435, 436 n.1 (2d Cir. 1973); *Mason* v. *American Express Co.*, 334 F.2d 292, 402 (2d Cir. 1964); *National Bank of Washington* v. *Mallery*, 669 F. Supp. 22, 26 (D.D.C. 1987); *Schomber* v. *Jewel Companies*, 614 F. Supp. 210, 215 (N.D. Ill. 1985); *Lumbermen's Underwriting Alliance* v. *Mobil Oil Corp.*, 612 F. Supp. 1166, 1168 n.2 (D. Idaho 1985); *Pirrone* v. *North Hotel Associates*, 108 F.R.D. 78, 84 n.2 (E.D. Pa. 1985); *McMahon Books, Inc.* v. *Willow Grove Associates*, 108 F.R.D. 32, 40 n.5 (E.D. Pa. 1985); *In re Federal Skywalk Cases*, 93 F.R.D. 415, 420 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In re "Dalkon Shield" Products Liability Litigation*, 526 F. Supp. 887, 910 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *See also Casper* v. *Cunard Line, Ltd.*, 560 F. Supp. 240, 242 (E.D. Pa.

(footnote continued on following page)

Petitioner fails to recognize that the three outdated categories of class actions defined in former Rule 23 merely attempted to clarify the "common or general interest" standard for class actions contained in former Equity Rule 38, the class action rule at issue in *Supreme Tribe*. *See* Fed. R. Civ. P. 23 advisory committee note (former Rule 23 is a "substantial restatement" of former Equity Rule 38); *System Federation No. 91* v. *Reed*, 180 F.2d 991, 995 (6th Cir. 1950). Because all Rule 23 class actions share the common heritage of Equity Rule 38, petitioner's contention that the principle applied in *Supreme Tribe* properly applies only to "true" class actions is unfounded. This is confirmed by the decisions after 1938 expressly applying *Supreme Tribe* to the "spurious" type of class action.[10]

Petitioner's belief that various federal court decisions support his position is mistaken. (Pet. at 10). In *Hackner* v. *Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941), *Steele*

(footnote continued from preceding page)

1983); *Esler* v. *Northrop Corp.*, 86 F.R.D. 20, 28 (W.D. Mo. 1979); *Rocket Oil and Gas Co.* v. *Arkla Exploration Co.*, 435 F. Supp. 1303, 1304-05 (W.D. Okla. 1977); *McGarry* v. *Lentz*, 9 F.2d 680, 683 (S.D. Ohio 1925).

[10] *See, e.g., Dickinson* v. *Rinke*, 11 Fed. R. Serv. 489 (S.D.N.Y. 1948), *aff'd*, 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *Shipley* v. *Pittsburgh & Lake Erie R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947); *see also Philadelphia Local 192* v. *American Federation of Teachers*, 44 F. Supp. 345 (E.D. Pa. 1942) (*dicta*).

Congress amended Rule 23 in 1966 and eliminated the tripartite class action scheme. As a result, all class judgments became binding on all class members, just as class judgments under former Equity Rule 38 and its predecessor bound all class members. *See Supreme Tribe*, 255 U.S. at 366-67; *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). Following the 1966 amendments, historically "spurious" class actions ceased being "permissive joinder devices," (Pet. at 9), if indeed they ever were, and became identical in substance and effect to historically "true" class actions. Therefore, no significant difference exists among class actions that would justify selective application of *Supreme Tribe* by this Court.

v. *Guaranty Trust Co.*, 164 F.2d 387 (2d Cir. 1947), and *Knowles* v. *War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948), the courts ruled that class members could not aggregate separate and distinct claims to satisfy the amount-in-controversy requirement. Each case reached the correct result because aggregation of such claims has always been prohibited by this Court. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Pinel* v. *Pinel*, 240 U.S. 594 (1916); *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832). In *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942), also cited by petitioner, the court merely held that a class action could not proceed because the plaintiffs had failed to satisfy the "common relief" requirement of former Rule 23(a)(3). Finally, petitioner's citation to *Illinois ex rel. Scott* v. *Hunt Int'l Resources Corp.*, 481 F. Supp. 71 (N.D. Ill. 1979), is disingenuous. *See* (Pet. at 12 n.8). In that case, the Attorney General of Illinois brought a suit in state court that was later removed to district court on grounds of diversity jurisdiction. The Attorney General moved for remand to state court. The district court granted the motion, holding that diversity did not exist because the Attorney General was the alter ego of the state, and a state is not a citizen for purposes of diversity jurisdiction. Rather than supporting petitioner's argument, the *Hunt* court contradicted it by rejecting the suggestion that it "look past the representative to the unknown class members to determine diversity." *Id.* at 74.

The rashness of petitioner's attack on the well-settled rule of *Supreme Tribe* and *Snyder* was abundantly clear to the court of appeals:

> [W]e confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is horn-book law, based on 66

> years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action.

(App. 710a) (citation omitted).[11]

B. The Named Plaintiffs and the Defendants Were Citizens of Different States.

Petitioner argues alternatively that the exercise of diversity jurisdiction over the class-action settlement was improper even if the Court chooses to endorse the 66 years of settled precedent spawned by *Supreme Tribe*. The petition asserts that (1) representative plaintiff Brian Quinn and defendant Riverdale Chemical were both Illinois citizens; (2) representative plaintiff Michael Ryan and defendant Hooker Chemical were both New York citizens; and (3) representative plaintiff Dan Jordan and defendant Diamond Shamrock were both Texas citizens. (Pet. at 14-17). A review of the Seventh Amended Complaint and the decision of the court of appeals amply demonstrates that petitioner's argument does not deserve this Court's attention. (JA 3533; App. 711a-713a).

The Seventh Amended Complaint was the first brought under diversity jurisdiction to name the class representatives. Consequently, it is the relevant complaint to assess

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[11] Petitioner's concerns regarding diversity jurisdiction are largely theoretical, as the district court could have entertained a number of alternative approaches. For example, a class action against all defendants could have been certified that included all veterans who were citizens of states other than the states in which any of the defendants was incorporated or had its principal place of business. Additional class actions could have been certified for the veterans from each state of which a defendant was a citizen, with each such action omitting the non-diverse defendant. All class actions could then have been consolidated and settled. The same result—a $180,000,000.00 settlement approved by the district court and affirmed by the court of appeals—would have occurred.

diversity jurisdiction. (App. 711a). Plaintiff Quinn was not named in the Seventh Amended Complaint. Former defendants Riverdale and Hooker had been dismissed prior to the filing of the Seventh Amended Complaint, and were not named therein. The citizenship of those former parties is irrelevant to the determination of diversity jurisdiction.

Because the dismissal of Riverdale and Hooker did not include a Fed. R. Civ. P. 54(b) certificate, petitioner claims that they remained parties for purposes of determining diversity jurisdiction. (Pet. at 15). Petitioner's argument ignores the "obvious purpose" of Rule 54(b), which is to assist a party in determining when an order of the district court may be appealed. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Consequently, as the court of appeals ruled, the lack of a Rule 54(b) certificate is irrelevant to the issue of diversity jurisdiction. (App. 712a).

Petitioner further claims that diversity was compromised because the Seventh Amended Complaint included plaintiff Dan Jordan, a citizen of Texas, and defendant Diamond Shamrock as named parties. The court of appeals properly described this argument as "meritless," *id.*, because Diamond Shamrock's principal place of business was in Ohio when the action was brought. *Smith* v. *Sperling*, 354 U.S. 91, 93 n.1 (1957) (jurisdiction "is tested by the facts as they existed when the action is brought * * *.") The fact that Diamond Shamrock later moved its principal place of business to Texas did not oust the court of jurisdiction. *See St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-90 (1938).

II.

The Fact-Bound Determinations Concerning Notice to Class Members Do Not Warrant Review by This Court.

Petitioner concedes that this Court's decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 314-20, and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 175, articulated the well-settled standard that governs the dissemination of notice to class members under Fed. R. Civ. P. 23 (c)(2). (Pet. at 17). That standard requires that the district court "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Petitioner does not dispute that those standards were applied by the district court and the court of appeals. (Pet. at 17-19). Petitioner's sole contention is that the court of appeals erred by not reversing factual determinations as to which class members could be identified through reasonable effort. *Id.* at 23-26. Specifically, petitioner asserts that the district court should have directed notice to a vastly larger group of people—all those who served in Vietnam—merely because the Agent Orange class members constitute a small subset of that group.

Petitioner's contention is totally unsupported in the law and is based on the sheer fantasy that there existed a substantially complete list of all persons who had served in Vietnam. (Pet. at 21). As the record amply demonstrates, no list of those persons has ever existed.

Class counsel served a subpoena on the custodians of records for the VA and the Department of Defense, seeking

all documents that contained the names and addresses of all active and retired personnel who served in Vietnam. (JA 1734). In response to the subpoena, the United States furnished declarations from five representatives of the VA and from Richard S. Christian, the Chief of the Agent Orange Task Force. (JA 17182-84). The Agent Orange Task Force was commissioned to provide records support for the congressionally mandated epidemiological study of Agent Orange being conducted by the VA. (JA 17182).

As Chief of the Agent Orange Task Force, Christian had consulted with representatives of the Army, Navy, and Air Force to determine the feasibility of identifying the names and addresses of Vietnam veterans from personnel files of the Armed Services. *Id.* In his declaration, Christian described in careful detail the inutility of the Armed Services' records for identifying class members, and concluded:

> Because of limitations inherent in the record keeping system of the armed services, only a small percentage of Vietnam veterans can be identified by computer. A manual search of millions of individual records would be required to identify the remainder, a task that would take several years to complete at a cost of several million dollars.

(JA 17183).

The decentralized records of the VA—with the single and important exception of the Agent Orange Registry which was used by the district court to identify class members—were also found to be of no value in naming Vietnam veterans who may have been class members. Those files neither purported to include the names of all veterans who served during the "Vietnam era," nor differentiated between "Vietnam-era" veterans who served in Vietnam and those

who served elsewhere.[12] (JA 17178-79). Even if petitioner's proposal for dissemination of notice to the over-inclusive group of Vietnam veterans had some merit, there existed no reasonable way to c reate such a list. As the court of appeals stated:

> We cannot agree with appellants that all 2.4 million Vietnam veterans should have been sent letter notice. First, it is undisputed that far fewer than that number were exposed to Agent Orange. A requirement ttat notice be given to all Vietnam veterans would thus have been considerably overbroad. Second, there is no assurance that such a list could have been compiled through reasonable efforts. Appellants claim that some records kept by the government would have facilitated individualized notice. They concede, however, that there was no easily accessible list of veterans * * *. We cannot find, therefore, that such a comprehensive list could reasonably have been compiled.

(App. 726a-727a). Moreover, as the court of appeals further observed, petitioner never objected to the notice provisions and offered

> no feasible alternative to the notice plan adopted by the district court for identifying and contacting persons actually exposed to Agent Orange. In this regard, we are informed by the statement of our late colleague Judge Friendly that it is inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us."

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[12] Of the estimated 9.1 million veterans who served in the Armed Forces during the "Vietnam era," only an estimated 2.5 million veterans, or 27 percent, actually served in Vietnam. (JA 17173). Of that smaller group, only a fraction could possibly have been class members.

(App. 727a) (*quoting Weinberger* v. *Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)).

The district court's determination of which class members were identifiable through reasonable effort was a factual one that was not overturned by the court of appeals as clearly erroneous. Having reviewed the entire record, the court of appeals was not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Anderson* v. *Bessemer City*, 470 U.S. 564, 573-76 (1985) (facts based on documentary evidence or inferences from other facts must be clearly erroneous to be overturned); Fed. R. Civ. P. 52(a). There is no reason for this Court to conduct yet another review.[13]

[13] Petitioner's exaggerations about the number of class notices that were returned as undeliverable relate only to supplemental lists provided by state governors in response to the court's substitute notice plan. The court could not utilize supplemental information supplied by two states, West Virginia and Massachusetts, because it was untimely or not in proper form. Even so, of the 28,000 West Virginia "Vietnam-era" veterans whose names were sent to the court, 8,000 had been sent notice in addition to the 1,087 class members from West Virginia who were identified through phase one of the class notice plan. (JA 17237, 11638-39). Concerning Massachusetts, 3,808 Massachusetts class members were identified and sent notice through phase one of the class notice. (JA 11638-39).

III.

The Decision of the Court of Appeals Is Not in Conflict With This Court's Holding in *Phillips Petroleum Co.* v. *Shutts.*

Petitioner further contends that absent class members who did not receive written notice, if any, are not bound by the judgment approving the settlement.[14] (Pet. at 20, 27-29). Petitioner then extrapolates that if all class members did not actually receive written notice, the settlement should be overturned. To support his reasoning, petitioner misconstrues language in *Phillips Petroleum Co.* v. *Shutts,* 472 U.S. 797 (1985), and urges the novel proposition upon this Court that all prior federal class action law was overturned by *Shutts,* which involved a Kansas state class action.

No case has ever held, and *Shutts* does not require, that personal notice actually be received by an absent member of a class certified under Rule 23(b)(3) in order that he be bound by the class-action judgment. *See Mullane,* 339 U.S. at 317-19. That some class members may not receive actual notice but be bound by the judgment is, perhaps, inevitable. It is a *sine qua non* for accomplishing the goals of Rule 23.

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[14] Petitioner has not identified even one class member who did not receive adequate notice of the class action. The petition merely raises the *hypothetical* possibility that some unnamed and unknown "class members" *may not have* received notice. (Pet. at 19-20).

It is well established that the sending of first-class mail to the last known addresses of class members who can be identified through reasonable effort, in conjunction with substitute notice for unidentifiable class members, fully satisfies the requirements of Rule 23 and due process. *See, e.g., Eisen,* 417 U.S. at 173-77; *Schroeder* v. *City of New York,* 371 U.S. 208, 214 (1962) (city's obligation to notify appellant of her right to be heard in condemnation proceeding was "an obligation which the mailing of a single letter would have discharged"). Indeed, this Court expressly has declined to require personal service of notice, even though receipt would thereby be guaranteed. *Mullane,* 339 U.S. at 318-19.

Shutts does not overrule or modify these well-settled principles. To misread its holding as requiring proof of receipt by all class members would destroy Rule 23, and render meaningless the principles established in *Eisen* and other decisions. *See generally* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co.* v. *Shutts,* 96 Yale L.J. 1, 19-20 (1986). Potential rights of hypothetical class members cannot be artificially heightened such that the practical necessities of *res judicata* are ignored. It does not offend any person's due process rights to let stand a class-action settlement in the face of hypothetical allegations that there *may* exist an absent class member who did not receive notice. *See Hansberry* v. *Lee,* 311 U.S. 32 (1940).

The Writ should be denied.

Conclusion

For the reasons set forth above, Respondents respectfully pray that the Court deny the petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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